STATE OF MICHIGAN
46th DISTRICT COURT

DISTRICT JUDGES

The Honorable
SHELIA R. JOHNSON
248-796-5810

The Honorable
SUSAN M. MOISEEV
248-796-5820

The Honorable
WILLIAM J. RICHARDS
248-796-5830

ADMINISTRATOR
DONNA BEAUDET
248-796-5800

CIVIL DIVISION
248-796-5870

CIVIL INFRACTION/
PARKING DIVISION
248-796-5860

MISDEMEANOR/
FELONY DIVISION
248-796-5880

PROBATION
DEPARTMENT
248-796-5850

TDD
248-354-3329

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March 22, 2012

Corbin Davis
Clerk of the Court
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

Re: ADM File 2006-47

Dear Clerk Davis:

The 46th District Court offers the following comments on the proposed amendments to MCR 3.101.

1. <u>We are concerned that the changes to MCR 3.101 (D) and (E) will force court clerks to issue obviously defective garnishments which will undermine the public's confidence in the courts, create unnecessary paperwork, and waste limited public resources</u>

   MCR 3.101 (D) currently states that "The Clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 2.114..." The language that the writ must "appear to be correct and comply with the court rules and statutes" is critical because it provides court clerks with the authority not to issue a garnishment if there are obvious defects or errors.

   However, the proposed amendment eliminates the language that the writ must appear to be correct and comply with the court rules and statutes. The new language in proposed MCR 3.101 (E) eliminates any meaningful standard for issuing garnishments by requiring clerks to issue the writ if the request is merely made on an SCAO form, is verified by the plaintiff, and if the judgment was entered by the court and remains unsatisfied. This language states the obvious, ignores the myriad of processing defects faced by court clerks on a daily basis, and provides no meaningful standards.

   As a result, if the amendment was approved, a court clerk would be forced to issue a writ even if it contained obvious defects or errors such as inconsistent,

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incorrect, contradictory, incomplete or inaccurate information. Here are some common problems, including some actual examples from our court files, where the proposed rule would have forced a clerk to issue obviously defective or barred garnishments:

- Inconsistent/Incorrect Party Names – Defendant's name listed as Bill Smith on complaint and judgment but garnishment filed against William R. Smith Sr. and the addresses do not match. Plaintiff name on the judgment is NCO Portfolio Management, assignee of Capitol One but plaintiff name on the garnishment is Cavalry SPV I, assignee of Cavalry SPV 1.
- Contradictory Judgment Amounts - Amount of the original judgment reported on the garnishment does not match the amount reported on the judgment.
- Mathematical Discrepancies –Amounts reported for original judgment, costs, interests and payments do not match the unsatisfied judgment amount reported.
- Excessive Interest - Plaintiff requesting clearly excessive post-judgment interest. For example, $800 in post-judgment interest being requested on $1,000 judgment entered 30 days prior.
- Excessive Costs – Plaintiff requesting clearly excessive post- judgment costs. For example, $2,561.89 in costs requested but court file only supports $60.
- Installment Payment Order in Effect – Under the proposed language, the clerk would be forced to issue a periodic garnishment even though it violates MCL 600.6215(2).
- Expired Judgment – Under the proposed language, the clerk would be forced to issue the garnishment even though the judgment had expired. (MCL 600.5809)
- Bankruptcy/Violation of Automatic Stay – Under the proposed language, the clerk would be forced to issue the garnishment even if the defendant had filed for bankruptcy. This would violate the Bankruptcy Court's automatic stay.

Issuing defective garnishments creates unnecessary procedural complications, delay, and is a poor use of public and private resources. The failure to nip a problem in the bud creates additional demands on the court, the parties and garnishees. The plaintiff must serve the defective writ and pay the disclosure fee. The garnishee must serve the defective writ on the defendant, file a disclosure and withhold funds if indebted. The angry defendant will likely be calling the court, complaining justifiably that the defective writ was issued. Objections to Garnishments are filed taking up more staff, judge and docket time. Meanwhile, the garnishee must continue to monitor and withhold payments, the defendant continues to lose possession of their property, and may incur additional charges or overdraft fees.

Forcing a clerk to issue obviously defective garnishments is not in the best interests of the administration of justice. It undermines the public's confidence in the courts and is a poor use of limited public resources. Fairness and common sense would suggest that a clerk should have the authority not to issue a writ when it does not appear to be correct.

Meanwhile, the rule continues to require the "clerk," not the "judge" and not the "court," to issue the post-judgment garnishment. Thus, the drafters intended the issuance of the writ to be a clerical function. Eliminating the language that the writ must appear to be correct and comply with the court rules and statutes would raise difficult questions: what is a clerk supposed to do with a proposed garnishment that contains clear errors that are clerical or ministerial in nature? Issue it with those defects? Expect a pro se defendant already in default on the underlying

judgment to spot the errors and request a hearing? Bump the issue to the judge, even though the rule has long given clerks the responsibility to issue the writ? With the language stricken that the writ must comply with statutes and court rules, what authority would even the judge have not to issue it?

The proposed rule would put court clerks in the position of still having the responsibility to issue the garnishment but lacking the authority to check for all but the most glaring of errors. Given the errors, as well as some of the predatory debt collection practices we have seen, this will effectively eliminate any meaningful review of garnishments before issuance. Yet, the writ will continue to bear the court's imprimatur. The proposed rule would turn clerks--and courts--into rubber stamps. It would open the door even wider to potential abuse, given the uneven playing field that currently exists between the typically represented creditors and the typically unrepresented debtors.

The current language is appropriate in order to give clerks the authority they need to check for clerical mistakes and provides an effective and efficient process. Now, for some unexplained reason, some unidentified party proposes to remove that language without even articulating what problems the current rule may have generated. There is no penalty or consequence to a court staff that is unable to perform a full review of a requested writ. Different courts have different levels of expertise. The rule as written is permissive, not mandatory, for clerks.

It is impossible to write a court rule that details the myriad of processing errors that occur and specifies the proper action to be taken. The proposed changes will provide a meaningless review and force clerks to robo-issue obviously defective garnishments. The existing language provides a workable standard and does not need to be changed.

2. Overall, we support the elimination of the requirement that a copy of the disclosure and final statement must be filed with the court. However, this will create negative unintended consequences in other areas that need to be addressed before this can be implemented.

From an efficiency perspective, eliminating the Court's copy of the disclosure will eliminate millions of pieces of paper filed with the courts that have little practical value and require significant court resources to open, stamp, key and file etc.

However, there are three areas that must be carefully considered and may need to be addressed if the court is not to receive a copy of the disclosure.

- **If garnishees continue to file unnecessary disclosures with the court, courts will now be required to make those records non-public. This will create unnecessary work for courts at a time they can least afford it** - Some garnishees have continued to send a "subsequent" disclosure to the court every time they withhold despite the fact that the court rule was changed in 1994. We estimate that this represents 15-20% of disclosures filed and creates significant additional work for the court to open, stamp, check and file these superfluous documents. The proposed language in MCR 3.101(H) making disclosures filed with the court non-public will exacerbate this problem. Since disclosures have been filed with the court for decades and considered public, we assume that the reason for now making them non-public is due to the new requirement to include identifying information such as social security number etc.

We strongly recommend that language be included in MCR 3.101(H), that any disclosure filed with the court that is not part of a motion or other pleading filed with the court, may be returned or destroyed by the court upon receipt.

- **MCR 3.101(R)** - The elimination of the court's copy of the disclosure will limit the degree that a court can effectively determine compliance with MCR 3.101 (R). Our experience has been that costs are frequently submitted in violation of MCR 3.101 (R)(costs). In these situations, the disclosures in the court file are used to determine if the garnishee was indebted and if the plaintiff is entitled to recover the costs of the garnishment.

- **MCR 3.101(S)** – If a plaintiff requests a default judgment to be entered against a garnishee for failure to disclose, it is sometimes helpful for the court to know if a disclosure had been filed with the court. Sometimes, the court may have received their copy but the large debt collection law office misplaced their copy. Since the garnishee has other recourses, such as filing a response to a Motion to Enter a Default Judgment Against Garnishee or filing a Motion to Set Aside Default Judgment, it is not critical that the court have a copy of the disclosure.

Thank you for your consideration.

Very truly yours,

Hon. Susan M. Moiseev Chief Judge	Hon. Shelia R. Johnson District Judge	Hon. Bill Richards District Judge

cc Hon. Don Passenger, President Michigan District Judges Association
Hon. Michelle Friedman Appel, Chair, Michigan District Judges Association Rules Committee